FILED

97 • 538 SEP 25 1997

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CAL TERHUNE, Director of the California Department of Corrections (LARRY WITEK, Warden - Chino), *Petitioners*,

v.

JOSEPH RAY MCBATH, SR., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
WILLIAM M. WOOD
Deputy Attorney General
Counsel of Record
110 West A St., Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2202
Fax: (645) 645-2191
Counsel for Petitioners

QUESTION PRESENTED

Can a federal court on habeas corpus review of a state law conviction for sufficiency of the evidence under the due process clause of the 14th Amendment to the United States Constitution, simply ignore a prior decision by the state court that the judgment is supported by the evidence presented at trial or must the federal court accord the state appellate court determination deference in assessing the constitutional claim?

PARTIES TO THE PROCEEDING BELOW

Joseph Ray McBath, Sr., respondent herein, was the petitioner and appellant in the appeal before the Ninth Circuit Court of Appeals from the denial of his petition for writ of habeas corpus by the United States District Court for the Central District of California. Respondents and Appellees in the Ninth Circuit proceeding were James Gomez, formerly Warden of the Correctional Training Facility at Soledad, California, where McBath was incarcerated pursuant to the state court judgment at issue in this proceeding when his petition for writ of habeas corpus was filed in the District Court, and the Attorney General of the State of California.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS WHY A WRIT SHOULD ISSUE	6
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Cases	
Ex parte Royall 117 U.S. 241 29 L. Ed. 868 65 S. Ct. 734 (1886)	7
Jackson v. Virginia 443 U.S. 307 61 L. Ed. 2d 560 99 S. Ct. 2781	6-9
Lindh v. Murphy ___ U.S. ___ 117 S. Ct. 2059 (1997)	10
Wright v. West 505 U.S. 277 120 L. Ed. 2d 225 112 S. Ct. 2482 (1992)	8, 9
Other Authorities	
Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214	10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

CAL TERHUNE, Director of the California Department of Corrections (LARRY WITEK, Warden - Chino), *Petitioners*,

v.

JOSEPH RAY MCBATH, SR., *Respondent*.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeals in McBath v. Gomez, et. al., filed August 4, 1997, in No. 96-55964, are unpublished and a copy appears at Appendix A to this petition. The District Court's Judgment and Order Denying Petition for Habeas Corpus and Directing Issuance of Certificate of Probable Cause for Appeal in McBath v. Gomez et al., filed April 12, 1996, in SA CV 94-967 AHS (EE) is unpublished and a copy appears at Appendix B. The Supplemental Report and Recommendation of United States Magistrate Judge on a Petition for Habeas Corpus by a Person in State Custody in McBath v. Gomez, et al., filed October 20, 1995, in SACV 94-967-AHS(EE), is unpublished and a copy appears at Appendix C. The opinion of the California Court of Appeal, Fourth Appellate District Court of Appeal, Division Three, in People v. McBath, filed May 28, 1993, in G011404, is unpublished and a copy appears in Appendix D.

STATEMENT OF JURISDICTION

The Memorandum Opinion of the Ninth Circuit Court of Appeals was filed August 4, 1997. This Court has jurisdiction to review the judgment by the Court of Appeals on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On February 26, 1990, Elly Preciado lived in the Pacific Woods Apartments at 16350 Harbor Boulevard in Fountain Valley, and also worked there as a maintenance man. 1RT 105.[1] He started work that morning around 7:50 a.m., walking around the apartment complex picking up paper. 1RT 123.

At approximately 8:00 a.m., Preciado noticed McBath on the apartment complex grounds. Preciado noticed McBath because he was acting suspicious and Preciado had been advised to be alert to strangers. 1RT 106, 126, 130. McBath wore a dark baseball hat with something on the front, Levis, and a blue jacket. 1RT 107-109, 135. Preciado followed McBath until he (McBath) approached the alcove where the front door to apartment 1101 was located. Thinking McBath knew

---

1. "RT" refers to the designated volume of the Reporter's Transcript from the state court trial, which was lodged with the District Court.

someone there, Preciado went about his duties. 1RT 111-113.

Deneva Williams lived at apartment 1101 and was awakened around 8:00 a.m. that morning by a knock on her door. She looked out the front door peephole and saw McBath. She watched him for 30 seconds without responding to his knock because she did not know him. 1RT 31, 33-36, 70, 73 ["I took a good look"].

She decided to return to her bedroom, turned and took about five steps when there was another knock at the front door. She looked out the peephole and again saw McBath. She watched McBath for about a minute and saw him turn away, reach a hand into his back pocket, and turn back to her front door. 1RT 36, 63, 75, 102. When McBath turned back to Williams's front door, she saw the door knob moving. She went to her bedroom and called 911. 1RT 38.

While on the phone with the emergency operator, Williams heard a loud knock on the living room window, then a loud knock on her bedroom window. Next, she heard another knock on the front door, another loud knock on the living room window, and another loud knock on her bedroom window.[2] Finally, she heard a loud bang from the front of her apartment. She later found that the glass in the dining room window had been broken near the window latch. 1RT 40-45, 60.

Orange County Deputy Sheriff Andrew Payne used his siren when he responded to Ms. Williams's apartment. 2RT 176. Shortly after arriving he transported her to a location to view a suspect detained by local police. When they arrived, Williams immediately said the suspect was not the man. 1RT 53; 2RT 166-167, 170. After returning to the victim's apartment, Deputy

---

2. The knocks on the windows sounded loud enough to break them. 1RT 77.

Payne was directed to take her to the Ha'Penny Inn on Harbor Boulevard to view another suspect. 2RT 171.

Deputy Carl Dick had seen McBath in front of the Ha'Penny Inn and detained him due to his similarity with the suspect description which had been broadcast. 2RT 159, 161. When Ms. Williams arrived with Deputy Payne, she immediately identified McBath as the man who was at her door. 1RT 54; 2RT 172.

Deputy Payne returned Ms. Williams to her apartment where he also spoke with Preciado. Preciado was asked to look at McBath, who was awaiting transportation in Deputy Payne's car. Preciado identified McBath as the man he had followed to the victim's front door. 1RT 116, 119; 2RT 174, 176.

Both Williams and Preciado identified McBath at trial. 1RT 37, 120. Preciado also identified the hat McBath was wearing at the time he was detained as the hat McBath wore at the apartment. 1RT 153; 2RT 164.

On June 5, 1990, following a trial by jury, McBath was found guilty of attempted residential first degree burglary. Cal. Pen. Code, §§ 664, 459, 460. He was subsequently found, in a court trial, to have suffered three prior serious felony convictions (Cal. Pen. Code, § 667, subd. (a)), and was sentenced on June 21, 1991, to state prison.

On May 28, 1993, the Court of Appeal, Fourth Appellate District, Division Three, filed its opinion affirming the conviction and sentence. The Court of Appeal rejected McBath's assertion that an essential element of his conviction, i.e., intent to steal, was without evidentiary support. See Appendix D. The California Supreme Court denied McBath's petition for review on August 18, 1993.

McBath filed the underlying federal habeas corpus petition in the United States District Court for the Central District of California, which had jurisdiction pursuant to 28 U.S.C. § 2254, on October 25, 1994. CR

1.[3] Pursuant to the order of the Magistrate Judge, issued November 1, 1994 (CR 5), Respondents filed a return to the petition on November 17, 1994 (CR 6), and a supplemental return on December 15, 1994. CR 7. The traverse was filed January 13, 1995. CR 12.

The report and recommendation of the Magistrate Judge was filed August 10, 1995. CR 14. Respondents' objections to the report and recommendation were filed August 30, 1995. CR 15. Pursuant to the September 6, 1995, order of the Magistrate Judge (CR 16), Respondents filed supplemental arguments in opposition to the petition on September 15, 1995. CR 18. The Magistrate Judge's supplemental report and recommendation was filed October 20, 1995 (CR 19) and Respondent's objections were filed November 6, 1995. CR 21.

On April 12, 1996, the District Court issued its order and entered judgment denying the petition. CR 22, 23. McBath filed a notice of appeal on May 8, 1996. CR 24. The District Court issued a certificate of probable cause for the appeal on June 17, 1996. CR 27.

The Ninth Circuit Court of Appeals had jurisdiction of the appeal from the underlying action pursuant to 28 U.S.C. section 2253.

---

3. CR refers to the Clerk's Record in the District Court proceeding, which was filed with the Court of Appeals.

REASONS WHY A WRIT SHOULD ISSUE

In Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781, this Court considered "what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence." Jackson v. Virginia, 443 U.S. at 309, 61 L. Ed. 2d at 567. The standard by which a federal habeas court reviews the sufficiency-of-the-evidence claim challenging a state court conviction "goes to the basic nature of the constitutional right recognized in the [In re] Winship [397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)] opinion." Jackson v. Virginia, 443 U.S. at 313, 61 L. Ed. 570.

> . . . Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

Jackson v. Virginia, 443 U.S. at 316, 61 L. Ed. 2d at 571.

If the prerequisites to federal habeas review have been satisfied, the due process claim is cognizable in a federal habeas corpus proceeding. Jackson v. Virginia, 443 U.S. at 321, 61 L. Ed. 2d at 575. However, this Court recognized that:

> "most meritorious challenges to constitutional sufficiency of the evidence undoubtedly will be recognized in the state courts, and, if the state courts have fully considered the issue of

> sufficiency, the task of a federal habeas court should not be difficult."

Jackson v. Virginia, 443 U.S. at 322, 61 L. Ed. 2d at 575, emphasis added; see id., 443 U.S. at 322, 61 L. Ed. 2d at 576 ["state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protection"]; see also id., 433 U.S. at 335, 61 L. Ed. 2d at 584 (Stevens, J., concurring).

Thus, this Court, in Jackson v. Virginia, reiterated what it has long recognized; i.e., that the state courts are equal partners with the federal courts in enforcement of constitutional rights and equally capable of reaching a correct resolution of a constitutional issue. See, Ex parte Royall, 117 U.S. 241, 251-252, 29 L. Ed. 868, 65 S. Ct. 734 (1886).[4] While a state court decision on the constitutional sufficiency question does not totally bar consideration of the issue by a federal habeas court, this Court has specifically noted that the state court decision is "entitled to great weight." Jackson v. Virginia,

---

4. In concurring, Justice Stevens aptly noted that there was actually no evidence or analysis supporting a conclusion that the state trial and review process presented any appreciable risk of erroneous factfinding:

> In this case, however, it would be impossible (and the Court does not even try), to demonstrate that there is an appreciable risk that a factfinding made by a jury beyond a reasonable doubt, and twice reviewed by a trial judge in ruling on directed verdict and post-trial acquittal motions and by one or more levels of appellate courts on direct appeal, as well as by two federal habeas courts under the Thompson "no evidence " rule, is likely to be erroneous.

Jackson v. Virginia, 443 U.S. at 333, 61 L. Ed. 2d at 582-583 (Stevens, J., concurring), footnote omitted.

443 U.S. at 322, n. 15, 61 L. Ed. 2d at 575, n. 15, emphasis added.

Of course, this Court refused to foreclose federal habeas review of a sufficiency claim simply because there had been a state court decision on the issue. However, not only did this Court, in Jackson v. Virginia, explicitly include consideration of a state court's resolution of the sufficiency question and imbue that decision with "great weight" in the federal habeas review, this Court also stated that the state court decision "is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction." Jackson v. Virginia, 443 U.S. at 323, 61 L. Ed. 2d at 576.

More recently, this Court revisited the question of "whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case." Wright v. West, 505 U.S. 277, 284, 120 L. Ed. 2d 225, 233, 112 S. Ct. 2482 (1992), (Thomas, J., lead opn.) However, the opinions in Wright v. West which reached the issue were sharply divided, leaving the question unanswered.[5]

As Justice Thomas noted, in Jackson v. Virginia, the Court clearly called for deference to, and great weight accorded, the state court determination, but went on, apparently, to call for independent review and analyze the issue *de novo*. Wright v. West, 505 U.S. at 290, 61 L. Ed. 2d at 237, citing Jackson v. Virginia, 443 U.S. at 342-326. Of course, that result followed from the Jackson Court's rejection of no review whatsoever when the state accorded

---

5. While the opinions in Wright v. West looked at the issue as dealing generally with mixed questions of law and fact, the issue presented here can be more refined, for as Justice Stevens noted in Jackson v. Virginia, "State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims." Jackson v. Virginia, 443 U.S. at 336, n. 9, 61 L. Ed. 2d at 585, n. 9.

the sufficiency claim a full and fair hearing on appeal. Jackson v. Virginia, 443 U.S. at 323, 61 L. Ed. 2d at 576. Moreover, there was, at least, some question whether the state appellate court applied the proper standard in its review. Jackson v. Virginia, 443 U.S. at 322. n. 15, 61 L. Ed. 2d at 575, n. 15. Further as noted by Justice Thomas, deferential review was accorded factual findings and, arguably, purely legal issues. Wright v. West, 505 U.S. at 291-295, 61 L. Ed. 2d at 237-240.

Nevertheless, Justice Thomas did not reach the issue, finding that by either standard of review, there was sufficient evidence to support the conviction. Wright v. West, 505 U.S. at 295-297, 61 L. Ed. 2d at 240-241.

Apart from her criticisms of Justice Thomas's opinion, Justice O'Connor sought to reconcile deference with *de novo* review. Wright v. West, 505 U.S. at 305, 61 L. Ed. 2d at 247 (O'Connor, J., concurring) However, her attempt blurs, rather than clarifies the language of Jackson v. Virginia. The notion that a state court decision becomes analogous to persuasive authority certainly begins to address the "great weight" to be accorded. Jackson v. Virginia, 443 U.S. at 322, n. 15, 61 L. Ed. 2d at 575, n. 15. However, consideration is clearly not deference and Justice O'Connor's rejection of deference fails to adequately address or even acknowledge the role and ability of state court's in enforcing federal constitutional rights:

> [T]his does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable.

Wright v. West, 505 U.S. at 305, 120 L. Ed. 2d at 247 (O'Connor, J., concurring).

This observation, however, begs at least two questions: "Incorrect by whose determination?" and "If reasonable, does not that show a decision which is, at worst, only arguably incorrect?" As has been poignantly observed, this Court is not last in the line of courts because it is correct; it is correct because it is last.

This case illustrates, perhaps as well as any, the ping-pong ball effect of de novo review and the ridicule which it engenders. Twelve jurors unanimously found guilt beyond a reasonable doubt. The sufficiency challenge was rejected by the state appellate court, and review was denied by the state supreme court. The federal magistrate judge concluded there was insufficient evidence, but the district court concluded otherwise. Two judges of the circuit court of appeal found insufficiency, while the third did not. Arguably, there was nothing incorrect in any of these legal determinations, and merely reflected a difference of opinion. Is the decision of the two judges of the circuit court of appeal correct simply because it comes last? Or would justice and the public's perception of the justice system be better served by recognizing that reasonable decisions, carefully reached are properly respected?

Finally, to Justice O'Connor's last point, Congress has now acted and provided statutory force to deference. Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214. Nonetheless, this case like others will not feel the impact of that new law. Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059 (1997). This case presents the opportunity to resolve the uncertainty left in the wake of Jackson v. Virginia and Wright v. West.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue.

Dated: September 24, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General

William M. Wood

WILLIAM M. WOOD
Deputy Attorney General
Counsel of Record

Counsel for Petitioners

AFFIDAVIT OF SERVICE BY MAIL

Attorney:	No. _____ October Term, 1997
DANIEL E. LUNGREN Attorney General of the State of California WILLIAM M. WOOD Deputy Attorney General	**CAL TERHUNE, Director of the California Department of Corrections (LARRY WITEK, Warden - Chino),** Petitioner, v. **JOSEPH RAY MCBATH, SR.** Respondent.
110 West A Street, Suite 1100 P. O. Box 85266 San Diego, California 92186-5266	

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within **PETITION FOR WRIT OF CERTIORARI and APPENDICES TO PETITION FOR WRIT OF CERTIORAI TO THE UNITED STATES SUPREME COURT** as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

ROBERT FRANKLIN HOWELL (3 copies)
ATTORNEY AT LAW
1666 GARNET AVENUE, SUITE 1004
SAN DIEGO CA 92109-3116

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the twenty fourth day of September 1997.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 24, 1997.

Rosemary Carmona
ROSEMARY CARMONA

BEST AVAILABLE COPY

CALIFORNIA

ALL-PURPOSE

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On 9/24/97 (DATE) before me, Christine J. Kaul Notary Public. (NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC")

personally appeared. Rosemary Carmona

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

PWR1 CHRISTINE J. KAUL Comm. # 1034176 NOTARY PUBLIC CALIFORNIA San Diego County My Comm. Expires July 31, 1998 PWR1

WITNESS my hand and official seal.

Christine Kaul
NOTARY PUBLIC SIGNATURE (SEAL)

OPTIONAL INFORMATION

TITLE OR TYPE OF DOCUMENT Affidavit of Service by Mail

DATE OF DOCUMENT 9/24/97 NUMBER OF PAGES one

SIGNER(S) OTHER THAN NAMED ABOVE _____